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NO. 86-983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court properly held that the constitutional prohibitions against unreasonable search and seizures requires that when a search warrant mistakenly cites a building as a single-family home, and upon arrival the police officers discover that the building is subdivided into two apartments on the inside of the house, the test as to whether the warrant is valid when the officers search the enitre building is whether the officers should have known that the building was more than a one-family unit when they applied for the warrant.

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OPINION BELOW

The opinion of the Illinois Appellate Court, First Judicial District, (People v. Weytkow, No. 85-948 (April 29, 1986)), is appended to the petition for a wirt of certiorari as Appendix 1a-5a. The Illinois Supreme Court denied petitioner's Petition for Leave to Appeal on October 2, 1986. A copy of that order is appended to the petition as Appendix 6a.

JURISDICTION

The petition having been timely filed within sixty days of the Illinois Surpeme Court's denial of leave to appeal, entered October 2, 1986, the jurisidiction of this Court is properly invoked under 28 U.S.C. 1257 (3)). However, as treated more fully below, respondent submits that no good reason exits for this Court to exercise its sound judicial discretion and grant the instant petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent will concur in petitioner's Statement of the Case. (Pet. at p. 2) Any additional facts which are required for a better understanding of the question presented will be included in the argument portion hereof.

REASON FOR DENYING THE WRIT

THE ILLINOIS COURTS PROPERLY HELD THAT THE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCH AND SEIZURES REQUIRES THAT WHEN A SEARCH WARRANT MISTAKENLY CITES A BUILDING AS A SINGLE-FAMILY RESIDENCE, AND UPON ARRIVAL POLICE OFFICERS DISCOVER THE BUILDING IS A TWO-FAMILY RESIDENCE, AND SEARCH THE ENTIRE BUILDING, THE TEST IN DETERMINING WHETHER THE WARRANT IS VALID IS WHETHER THE POLICE OFFICERS SHOULD HAVE KNOWN THAT THE BUILDING WAS MORE THAN A ONE-FAMILY UNIT WHEN THEY APPLIED FOR THE WARRANT.

Petitioner contends that the Illinois Appellate Court, by affirming the trial court's decision to deny the petitioner's motion to quash search warrant, denied the petitioner's Fourth Amendment right to be

free from unreasonable search and seizures. The premise underlying the petitioner's meritless contention is that the Appellate Court applied an improper standard in determining whether the search warrant was valid.

In the case at bar, the search warrant commanded the search of the petitioner and 14248 S. Kostner, Crestwood, a house, to seize, cocaine to wit: a controlled substance, along with any other drug cutting paraphenalia at that residency. Upon arriving at this address the police offiers learned that, from inside, the building had been structurally divided into two apartments. The officers searched both apartments and in the petitioner's apartment they found over 500 grams of cocaine; two scales with traces of cocaine; $34,000 in cash; a

gun, ammunition, brass knuckles, and a flight plotter with the petitioner's fingerprints.

Under these circumstances the Fourth Amendment requires, and the petitioner concedes (Pet. at 7), the test in determining the validity of the warrant is whether the officers should have known that the building was more than a one-family unit when they applied for the warrant. United States v. Esters, (D.C. Mich. 1972), 336 F.Supp. 214, citing Owens v. Scafati, (D.C. Mass 1967), 273 F.Supp. 428, cert. denied, 391 U.S. 969, 88 S.Ct. 2043, 20 L.Ed.2d 883,

However, the petitioner erroneously maitains that the Appellate Court applied a standard which required the police to have actual knowledge that the building was more than a one-family unit when they applied

for the warrant in order to render the warrant invalid. (Pet. at 9-10) The respondent submits that this is a gross misstatement of the Appellate Court's holding.

The Appellate Court's holding clearly revealed that it considered whether the officers should have known the two-unit nature of the building when they applied for the warrant, not whether the officers knew for a fact that the building's interior had been structurally subdivided and contained two apartments.

In considering what the officers should have known, the Illinois Appellate Court stated:

> "...This was not a case where the police entered a multi-unit residential building and proceeded to search every unit there in an obvious fishing

> expedition until they found the unit with the evidence they wanted; the search warrant here clearly named and described the defendant and his "house." Nor do we believe that it should have been readily apparent to the police officers here, until they actually entered, that the building was a two-unti dwelling...." (App. Ct. op. at 3-4)

Thus by expressing that the exterior of the house was not an obvious indication that it was a two-unit dwelling, it is clear that the Appellate Court properly considered whether the officers should have known that the building was more than a one-unit dwelling.

In further discussion of the exterior of the petitioner's house the Appellate Court stated that: "The building generally appeared to be a single-family residence..."

(App. Ct. Op. at 3-4) The court further noted that there were not "two separate exterior front entrances, or two doorbells or utility meters." (App. Ct. Op. at 4)

These statements by the Appellate Court belie the petitioner's claim that the Court improperly considered whether the officers had actual knowledge of the two-unit nature of the building, rather than whether they should have known of the two-unit nature of the building. The Appellate Court's observations of the general exterior of the building clearly demonstrates that the Court was considering whether the outside appearance of the building should have put the officers on notice that the building contained an upstairs apartment.

Additionally, the Appellate Court's citing of United States v. Santore, (2nd Cir. 1960), 290 F.2d 51 and People v.Thomas,

70 Ill. App.3d 459, 388 N.E.2d 1941 (1st Dist. 1979), is further evidence that the Court was aware of, and did indeed apply the proper standard. (Thomas and Santore both expressly held that where a search warrant mistakenly cites a building as a single-family residence, and upon arrival police officers discover that the building is a two family residence, and search the entire building, the test in determining whether the warrant is valid is whether the police officers should have known that the building was more than a one-family unit when they applied for the warrant) 290 F.2d at 67, and 388 N.E.2d at 943.

Thus, it is clear that the petitioner's attempt to gain certiorari claiming that the Illinois Appellate Court applied the wrong Fourth Amemdment criteria must fail. The State of Illinois properly

afforded the petitioner all the protections guaranteed him under the Fourth Amendment.

As the Illinois Appellate Court properly held that the Fourth Amendment requires that when a search warrant mistakenly cites a building as a single-family residence, and upon arrival police officers discover the building is a two-family residence, and search the entire building, the test in determining whether the warrant is valid is whether the police officers should have known that the building was more than a one-family unit when they applied for the warrant, the petitioner is not entitled to a writ of certiorari and the petition must be denied.

CONCLUSION

Wherefore, for all the foregoing reasons the respondent prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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